

**DECISION**

24968  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-208336

**DATE:** April 22, 1983

**MATTER OF:** Fort Benjamin Harrison - Dual  
Compensation Act - Appropriated and  
Nonappropriated Fund Positions -  
**DIGEST:** Waiver Act Jurisdiction

1. Individual, who was working for non-appropriated fund activity, accepted a temporary full-time appointment in appropriated fund position and worked two jobs in excess of 40 hours per week. Employee has violated Dual Compensation Act, 5 U.S.C. § 5533(a), by working more than 40 hours per week in two "positions" as defined under section 5531(2). The test is not whether the positions are paid from appropriated funds, but whether the employee worked in "positions" as defined by the statute which expressly includes positions in a nonappropriated fund instrumentality of the armed forces.
2. When an employee holding one position is appointed to another position in violation of dual compensation laws, a rebuttable presumption arises that the employee intended to give up his first position. The agency must determine from which position the erroneous payments arose. In any event, the indebtedness is owed to the United States, the collection of which is subject to waiver under 5 U.S.C. § 5584 (1976) and 4 C.F.R. Parts 91 and 92 (1982).

The issue presented is whether an individual who is employed by the Department of the Army in both an appropriated fund position and a nonappropriated fund position at Fort Benjamin Harrison, Indiana, is in violation of the Dual Compensation Act, 5 U.S.C. § 5533(a). We hold that where an individual works in two positions for a total of more than 40 hours in a calendar week, he or she is in violation of the Dual Compensation Act, even though the salary of one position is paid from nonappropriated funds.

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This decision is in response to a request from Lieutenant Colonel D. W. Mikkelsen, FC, Executive, Assistant Comptroller for Finance and Accounting, Department of the Army. The request concerns an individual who was employed in a nonappropriated fund activity position beginning in January 1981, and who received a temporary full-time appointment in an appropriated fund position on November 2, 1981. Unbeknownst to the Civilian Personnel Office, the employee continued to work in the nonappropriated fund activity position, and the total hours for the two positions exceeded 40 hours per week from November 1981 to July 1982. The Army questions the application of the Dual Compensation Act, 5 U.S.C. § 5533(a), since one of the positions is paid from nonappropriated funds.

The Dual Compensation Act, 5 U.S.C. §§ 5531-5537 (1976), provides in section 5533(a) that, with certain exceptions not pertinent here, "an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week (Sunday through Saturday)." The term "position" as used in the Act is defined in section 5531(2) as follows:

"(2) 'position' means a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces) or in the government of the District of Columbia; \* \* \*." (Emphasis added.)

Thus, it is clear that an individual who occupies a "position" in one of the nonappropriated fund instrumentalities specified is subject to the Dual Compensation Act. B-200240, May 5, 1981; and B-170086, July 31, 1970. See also 50 Comp. Gen. 604 (1971); and 47 Comp. Gen. 185 (1967). For the purposes of the Dual Compensation Act, the test is not whether the positions are paid from appropriated funds but whether the individual occupies a "position" as defined by section 5531(2) which expressly includes positions in a nonappropriated fund instrumentality under the jurisdiction of the armed forces.

Since both positions are covered by the Dual Compensation Act, the employee involved has been erroneously overpaid during those weeks when the employee worked more than 40 hours. In order to compute the employee's indebtedness, the agency must determine from which position the erroneous payments arise. Our decisions have held that when an employee holding one position is appointed to another position in violation of dual compensation or dual employment laws, a rebuttable presumption arises that the employee intended to give up the first position. 32 Comp. Gen. 448 (1953); 19 Comp. Gen. 751 (1940). In that situation, the employee is entitled to retain the pay of the second position and he must return any pay received from the first position during the period of dual employment. However, if the facts rebut the presumption of intent to give up the first position, then the employee would be indebted for the erroneous payment of pay from the second position. Aubrey P. Wilkerson, B-195783, October 2, 1980. The Army should review the pertinent facts and determine which payments were erroneous.

In any event the indebtedness is to be regarded as one owing to the United States as distinguished from an instrumentality of the United States. Since the indebtedness to the United States arose out of erroneous payments of pay to an employee of the Department of the Army, the waiver of collection provisions of 5 U.S.C. § 5584 are applicable. B-170086, July 31, 1970.

*Naray R. San Clere*  
for Comptroller General  
of the United States